Supreme Court, U.S.
FILED
OCT 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH ROBINSON,

Petitioner,

VS.

MICHAEL ADAMS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT C. CARLSON
LYNN M. BOUSLOG
MOWER, KOELLER AND NEBEKER
1120 W. LA VETA AVENUE
SUITE 710
ORANGE, CALIFORNIA 92668
(714) 541-2542

Counsel for Respondents

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	12
REASONS FOR DENYING THE WRIT OF CERTIORARI.....	13
A. THE SECTION 1981 AND TITLE VII DISPARATE TREATMENT ANALYSIS UTILIZED BY THE COURT BELOW DOES NOT CONFLICT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT, WITH THE DECISIONS OF OTHER CIRCUITS, OR WITH THE PREVIOUS DECISIONS OF THE NINTH CIRCUIT.....	13
1. Petitioner Did Not Produce Sufficient Evidence to Create a Genuine Issue of Fact in Response to the County's Evidence That the Screeners Were "Unaware" of Robinson's Race At the Time of Reviewing His Applications.....	13

2. The Present Case Does Not Address the Issues Under Review By This Court in Harbison-Walker..... 18

B. THE DISPARATE IMPACT ANALYSIS UTILIZED BY THE COURT BELOW DOES NOT CONFLICT WITH THE PRINCIPLE ESTABLISHED BY THIS COURT, WITH THE DECISIONS OF OTHER CIRCUITS, OR WITH THE PREVIOUS DECISIONS OF THE NINTH CIRCUIT..... 21

1. The Court Below Did Not Hold, As a Matter of Law, That The Presence of Black Female Employees Was Sufficient To Withstand a Claim of Discrimination Against Black Males..... 21

2. The Present Case Does Not Address the Issues Under Review By This Court in Wards Cove Packing v. Atonio..... 25

CONCLUSION..... 30

TABLE OF AUTHORITIES

CASES

Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986)..... 10, 15

Connecticut v. Teal, 457 U.S. 440 (1980)..... 22, 23

Furnco Construction Company v. Waters, 438 U.S. 567, 569 (1978)..... 22

Harbison-Walker Refractories v. Brieck, no. 87-271, 56 U.S.L.W. 3647 (March 21, 1988).....12, 18-19, 21

Hazelwood School District v. United States, 433 U.S. 299 (1977)..... 27

Hicks v. Gates Rubber Company, 833 F. 2d 1406 (10th Cir. 1987)..... 22

Hutchinson v. Proxmire, 443 U.S. 11, 120 note 9..... 15, 16

Jeffries v. Harris County Community Action Assocation, 615 F. 2d 1025 (5th Cir. 1980)..... 22

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973).... 3, 4

Page

Moore v. Hughes Helicopter, Inc., 708 F. 2d 475, 482-83 (9th Cir. 1983)..... 24

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)..... 22

Poller v. Columbia Broadcasting Company, 368 U.S. 464 (1962).... 15, 16

Wards Cove Packing Co., Inc. v. Atonio, 827 F. 2d 439 (9th Cir. 1987), Cert. granted, 56 U.S.L.W. 3887 (June 28, 1988).....12, 26, 28-29

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. section 621, et seq..... 18

Civil Rights Act of 1866, 42 U.S.C. Section 1981..... 3

MISCELLANEOUS

B. Schlei & P. Grossman, Employment Discrimination Law (2d Ed. 1983)..... 24

STATEMENT OF THE CASE

In July and August, 1983, petitioner, Kenneth Robinson, applied for four separate positions with the County of Orange; (1) Administrative Analyst III; (2) Employment Services Representative IV; (3) Investigator - Social Services; and (4) Probate Examiner I. This last position, Probate Examiner I, fell within the auspices of the Orange County Superior Court.

In each instance, Robinson's application was denied at the initial screening phase due to a determination by the screener for each position that Robinson's written application did not reflect that he possessed the necessary qualifications and work experience required for the position, and/or that he was not

among the most qualified applicants.[1] (App. 46a-47a, 53a-54a, 58a, 60a-61a). Robinson did not reach the interview stage in the job application process based upon the inadequacy of the information before the screeners. Id. Moreover, each screener stated, under oath, that they were unaware of Robinson's race at the time they reviewed his application and determined that he did not possess the necessary skills and/or experience. Id.

Upon rejection of his employment discrimination claim by the Equal Employment Opportunity Commission, Robinson filed the present action against the County of Orange, the individual job screeners, and the Orange County Superior Court, premised upon the

---

1. In each instance, references are to the appendix attached to the "Petition for a Writ Certiorari to the United States Court of Appeals for the Ninth Circuit" filed by petitioner Robinson.

Civil Rights Acts of 1866, 42 U.S.C., Section 1981. Respondents filed a motion for summary judgment attacking Robinson's ability to satisfy the prima facie elements of a section 1981 action as set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). An Order was entered by the District Court on March 21, 1985 granting the County's motion with respect to the section 1981 claims. (App. 77a-80a).

Thereafter, Robinson successfully requested leave to amend his original complaint to state a Title VII action. The defendants then filed a second motion for summary judgment based on both the "disparate treatment" and "disparate impact" claims available under Title VII.

In denying Robinson's section 1981 and Title VII claims, the District Court

adopted the findings and conclusions of the Magistrate that petitioner Robinson had "failed to apply" for the positions of Administrative Analyst III, Employment Services Representative IV and Investigator-Social Services, pursuant to McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), since the applications completed by Robinson did not reflect that he possessed the necessary qualifications for those positions. (App. 42a-43a).

With respect to the final position within the Orange County Superior Court, i.e. Probate Examiner I, Robinson's application did not indicate that he was among the "most qualified" applicants since there were other candidates who were also law school candidates, but who in addition had relevant experience in the Probate

court. (App. 61a).

The Magistrate thus recommended, and the District Court concurred, that summary judgment should be granted in favor of the County with respect to Robinson's Title VII disparate treatment claims. (App. 19a-21a).

With respect to Robinson's Title VII disparate impact claims, the District Court concluded that Robinson had failed to identify any particular employment practice of the County which had an adverse impact upon the class of black males. Moreover, the only "vaguely pertinent statistic" proffered by Robinson was the fact that the Orange County Superior Court (direct employer for the position of Probate Examiner I) had no black males as of April, 1984. The court determined, however, that "this statistic does not, in and of itself,

demonstrate that an identified employment practice discriminates against black males." (App. 27a-28a).

The District Court concluded that Robinson had presented no evidence which was sufficient to withstand the County's summary judgment motion:

> "Thus, the plaintiff did not attempt to show at the summary judgment hearing how many applicants applied for each of the jobs in issue in this case, how many of these applicants were black males, how many of the black male applicants were exclude[d] by the challenged employment practice, and whether the number of black males excluded from the applicant pool by the use of the challenged employment practice was disproportionate to the number of other applicants excluded by use of the employment practice. The plaintiff must be able to make a showing of this type in order to demonstrate the existence of a prima facie case that a 'facially neutral employment practice had a significantly discriminatory impact.' Connecticut v. Teal, supra, page 446." (App. 31a)

Thereafter, Robinson appealed the District Court's orders to the Ninth Circuit Court of Appeals. Following oral argument and a de novo review of the evidence presented by both the plaintiff and defendants, the Ninth Circuit affirmed the District Court's orders granting summary judgment in favor of the County as to Robinson's section 1981 and title VII disparate treatment and disparate impact claims.

Robinson then petitioned for "Rehearing With Suggestion For Rehearing En Banc." The panel voted to deny the petition for rehearing, and a majority of the full court rejected the suggestion for rehearing en banc. (App. 4a). The court's "Order and Amended Opinion" is attached to the present petition, commencing at Appendix page 1a.

With respect to the section 1981 and Title VII disparate treatment claims, the court below preliminarily noted that Robinson must be able to establish "intentional" discrimination. In support of their motion for summary judgment, the County presented affidavits of each of the application screeners wherein it was stated, under oath, that each screener was unaware of Robinson's race at the time they reviewed his application for the respective positions.

In response, Robinson merely asserted that the screeners "must have known" of his race since the copy of the applications he had completed and which were received via discovery contained a box wherein he had noted, by means of an "X" in a box, that he was black. The following paragraph, however, appeared at the top of the section

of the application form requesting such racial and demographic information:

> "Orange County is asking all applicants for positions to complete this form in order to comply with United States Government Equal Employment Opportunity requirements. Information you provide will not be used in any way as part of the testing process. This flap will not be duplicated or made available to hiring department [sic]. Data collected is used for statistical purposes and to measure the County's effectiveness of recruiting efforts." (App. 6a). (Emphasis in original)

In short, the screeners contended, through affidavits, that they were not aware of Robinson's race when they reviewed his application, i.e. they did not view the racial/demographic information during the initial screening process. The only controverting evidence supplied by Robinson was his own statement that the screeners "must have known."

The Court of Appeals did not view such evidence by Robinson as rising to a level which created a triable issue of fact for the jury.

> "Significantly, Robinson does not point to any evidence tending to show that this procedure resulted in the disclosure of racial information to application screeners in his or any other case. The only evidence in the record, the affidavits of the application screeners, unequivocally suggests that the procedure worked. Robinson's evidence on this issue is 'merely colorable' and is not 'significantly probative'. Liberty Lobby, 106 S. Ct. at 2511. Therefore, we hold that no genuine issue exists as to whether the application screeners were aware of his race." (App. 7a).

With respect to Title VII disparate impact claims, the court below emphasized that Robinson failed to identify a specific employment practice or criteria which had an adverse impact on the class of black males. (App. 9a).

In support of its motion for summary judgment, the County produced statistics reflecting that, while blacks comprised 1.2% of the Orange County population in 1984, 2.7% of the "professional" and "official/administrative" positions with the County of Orange, and 1.7% of the Orange County Superior Court positions were held by blacks. In response, Robinson noted that in April, 1984, there were no black males employed by the Superior Court.

The court below deemed that this statistic, standing alone, in the absence of an identifiable employment practice having an adverse impact on Robinson's class, was insufficient to create a genuine dispute regarding facts material to a prima facie case of disparate impact. Thus, summary judgment in favor of the County was deemed appropriate. (App. 9a-10a).

SUMMARY OF ARGUMENT

This Court should deny the present Petition for Writ of Certiorari since the decision of the court below does not conflict with the principles established by this Court, with the decisions of other circuits, or with the previous decisions of the Ninth Circuit. Moreover, this case does not present issues similar to those presented in two other cases under review by this court: Wards Cove Packing Co., Inc. v. Atonio, 827 F. 2d 439 (9th Cir. 1987), Cert. granted, 56 U.S.L.W. 3887 (June 28, 1988) and Harbison-Walker Refractories v. Brieck, no. 87-271, 56 U.S.L.W. 3647 (March 21, 1988).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. THE SECTION 1981 AND TITLE VII DISPARATE TREATMENT ANALYSIS UTILIZED BY THE COURT BELOW DOES NOT CONFLICT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT, WITH THE DECISIONS OF OTHER CIRCUITS, OR WITH THE PREVIOUS DECISIONS OF THE NINTH CIRCUIT

1. Petitioner did not Produce Sufficient Evidence to Create a Genuine Issue of Fact in Response to the County's Evidence that the Screeners were "Unaware" of Robinson's Race at the Time of Reviewing His Applications.

The court below concluded that, to present a prima facie case of "intentional" discrimination pursuant to section 1981 or Title VII, it was incumbent that the County's employees, at a minimum, be aware

of Robinson's race at the time the applications were reviewed and rejected.

As noted above, each County employee stated, in an affidavit, that they did not know Robinson was black at the time they reviewed his application and determined that he either did not possess the requisite skills and/or experience, or was not among the most qualified applicants. In an effort to survive the motion for summary judgment, Robinson asserted that the screeners "may have known" or "could have discovered" that he was black because of the presence of his racial background on the application forms produced by the County during discovery. The court below did not view this assertion as sufficient to withstand the motion for summary judgment.

In the present Petition for Writ of Certiorari, Robinson contends that since the

"ultimate issue is the state of mind or intent of individuals," this matter does not "readily lend itself to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 note 9. Robinson further relies upon Poller v. Columbia Broadcasting Company, 368 U.S. 464 (1962) for the proposition that the defendant should seldom, if ever, be granted summary judgment where his "state of mind" is at issue and the jury might disbelieve him or his witnesses as to this issue. (Petition, page 31-32).

The decision of the court below is not contrary to either Hutchinson, supra, nor Poller, supra. As explained by this court more recently in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986):

> "Our statement in Hutchinson v. Proxmire, 443 U.S. 111, 120 (1979), that proof of actual malice 'does not readily lend itself to summary disposition' was simply an acknowledgement of our general reluctance to grant special procedural protection to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." Id. at 256, n. 7.

Moreover, this court further explained that Poller, supra, does not insulate the non-moving party from summary judgment in the absence of concrete evidence:

> "We do not understand Poller, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of a legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in

turn evidence that would support a jury verdict." Id. at 256.

In short, the court determined in Anderson, supra, that the plaintiff therein had not produced sufficient evidence to create a triable issue of fact for the jury in response to the defendants' affidavits regarding their belief in the truth of purportedly libelous statements. When evidence opposing a summary judgment is "merely colorable" or not "significantly probative" summary judgment may be granted. Id. at 249-250.

Such was the conclusion of the court below in response to Robinson's assertions that the County's screeners "may have known" or "could have discovered" his race when reviewing his application. The court below determined that Robinson failed to create a genuine issue as to whether these screeners

were aware of his race, therefore, summary judgment as to Robinson's section 1981 and Title VII disparate treatment claims was deemed appropriate.

2. The Present Case Does Not Address the Issues Under Review by This Court in Harbison-Walker

Petitioner suggests that the court should, at a minimum, hold the present petition pending resolution of Harbison-Walker, a disparate treatment case under the Age Discrimination in Employment Act, 29 U.S.C. section 621, et. seq. This court granted review of Harbison-Walker to address the question: "Can a plaintiff who alleges intentional discrimination survive a summary judgment merely by questioning the employer's business judgment, without presenting evidence, direct or indirect,

that the employer's judgment in fact was motivated by intent to discriminate?" (No. 87-271, 56 U.S.L.W. 3647).

The present case, in comparison, does not address, or raise the issues, of the quantum or nature of evidence needed to respond to an employer's asserted "business judgment" reasons for failing to employ (or deciding to terminate) an individual.

In Harbison-Walker, the employee asserted that he had been terminated because of his age, and thus filed an "intentional discrimination" claim pursuant to ADEA. The employer responded by asserting various "business judgment" reasons for the employee's discharge. The Third Circuit Court of Appeals, in reviewing the lower court's summary judgment in favor of the employer, placed upon the employer the burden of establishing that the former

employee would be "unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the [employer's] proffered reason is subject to factual dispute."[2] (Emphasis in original)

Summary judgment in the present case, however, was granted on the basis that the claimant did not proffer sufficient evidence of a prima facie case of "intentional" discrimination, i.e. that the employer was even aware of his race at the time of the review of Robinson's applications. Thus, the burden did not shift to the County to prove the "business necessity" of its employment practices. The present decision does not, therefore, involve the same, or

---

2. Brief for Petitioner at page 5, Harbison-Walker Refractories v. Brieck, no 87-271.

similar, analysis under review in Harbison-Walker.

B. THE DISPARATE IMPACT ANALYSIS UTILIZED BY THE COURT BELOW DOES NOT CONFLICT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT, WITH THE DECISIONS OF OTHER CIRCUITS, OR WITH THE PREVIOUS DECISIONS OF THE NINTH CIRCUIT

1. The Court Below Did Not Hold, as a Matter of Law, That the Presence of Black Female Employees Was Sufficient to Withstand a Claim of Discrimination Against Black Males

Petitioner contends that the court below "treated the employment of black females as a justification for

discrimination against the plaintiff and other black males..." (Petition, page 20-21). Therefore, according to the petitioner, the decision of the court below conflicts with this Court's decision in Connecticut v. Teal, 457 U.S. 440 (1980), Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), and Furnco Construction Company v. Waters, ~~438 U.S.~~ 567, 569 (1978), as well as the Fifth Circuit Court of Appeals in Jeffries v. Harris County Community Action Association, 615 F. 2d 1025 (5th Cir. 1980), and the Tenth Circuit in Hicks v. Gates Rubber Company, 833 F. 2d 1406 (10th Cir. 1987). The court below did not, however, arrive at such a conclusion.

The court did acknowledge that the "most probative" statistics offered did not reflect discrimination by the County against the class of blacks as a whole. While

Robinson's evidence regarding the absence of black males in the Orange County Superior Court work force "could" result from racial discrimination, the court deemed that this fact, standing alone, was insufficient to withstand the County's motion for summary judgment. To create a prima facie case of discrimination against black males, Robinson must identify a specific employment practice and show a "causal relationship between the practice and the impact." (App. at 9a).

In short, both the District Court and the court below concurred that Robinson had simply not presented sufficient evidence of the elements of a prima facie case of racial discrimination under a disparate impact theory.

As explained by this court in Connecticut v. Teal, 457 U.S. 440 (1982), to establish a prima facie case of

discrimination, the claimant must show that a facially neutral practice has a significantly discriminatory impact on a protected class. This, the court below determined, Robinson did not do. Not only did Robinson fail to adequately identify the purported "employment practices," but he failed to establish the usefulness of "general population" statistics. The court below noted that it had consistently "rejected the usefulness of general population statistics as a proxy for the pool of potential applicants when the employer sought applicants for positions requiring special skills," citing Moore v. Hughes Helicopter, Inc., 708 F. 2d 475, 482-83 (9th Cir. 1983). This position was espoused by B. Schlei & P. Grossman in Employment Discrimination Law (2d Ed. 1983), wherein it is explained that when special

qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. Id. at page 1338, note 13.

In sum, the court below did not recognize the statistics proffered by Robinson as a significantly probative reflection of an adverse impact on the protected class of black males. This determination, nor the court's analysis in reaching this conclusion, conflicts with the decisions of this Court, nor the courts of other circuits.

2. The Present Case Does Not Address the Issues Under Review by This Court in Wards Cove Packing v. Atonio

Petitioner contends that, as an

alternative to granting the present petition, this petition should be held pending the court's resolution in Wards Cove Packing Company, Inc. v. Atonio, 827 F. 2d 439 (9th Cir. 1987), Cert. granted (June 28, 1988), no. 87-1388, 56 U.S.L.W. 3887. The issues under review in Atonio, supra, however, are not similar to those set forth by the petitioner herein.

In Atonio, this court will review the question as to whether statistical evidence that shows only a concentration of minorities in jobs not at issue fail, as a matter of law, to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force and does not promote from within or provide training for such jobs, and where minorities are not under represented in at-

are not under represented in at-issue jobs.[3]

In support of its petition, Wards Cove explained that the court below held in that case that a "mere internal work force showing of 'concentration' of minorities, without regard to the factual circumstances, is sufficient to establish the disparate impact of the amalgam of practices plaintiffs choose to name."[4] As such, the Ninth Circuit Court purportedly departed form this court's decision in Hazelwood School District v. United States, 433 U.S. 299 (1977).

The present case, however, does not address the issues arising out of "concentration" of minorities in an

---

3. Brief for Petitioner, at i Wards Cove Packing Company, Inc. v. Atonio, no 87-1387.

4. Brief for Petitioner, at pg. 9, Wards Cove Packing Company, Inc. v. Atonio, no. 87-1387.

employer's work force.

In Wards Cove Packing, supra, this court will also determine whether the court below "committed error in allowing employees to challenge the cumulative effect of a wide range of employment practices under the disparate impact model."[5] In support of Wards Cove's position regarding the court's error in this regard, Ward's Cove noted the unjust burden which had been inflicted by the court therein upon the employer, requiring the employer to prove the "business necessity" of each and every practice which the claimant alleged "combined" to "cause" the purported concentration of minorities.[6]

---

5. Brief of Petitioner, at i, Ward's Cove Packing Co., Inc. v. Atonio, no. 87-1387.

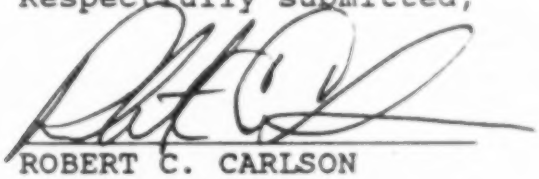
6. Brief of Petitioner, at pg. 18-19, Ward's Cove Packing v. Atonio, no. 87-1387.

Clearly, the analysis by this Court with respect to this issue is not applicable to the present matter wherein the court below determined that the claimant failed to offer probative statistics reflecting an adverse impact on the claimant's class. The court below did not address the employer's burdens with respect to establishing the "business necessity" of employment practices. The "delegation" of burdens issue was not addressed by the court below based on its determination that the claimant therein had initially failed to present statistics indicative of an adverse impact on the claimant's protected class. Thus, the present case does not offer or present issues similar to those under review in Wards Cove Packing v. Atonio.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,



ROBERT C. CARLSON
LYNN M. BOUSLOG
of MOWER, KOELLER & NEBEKER
1120 W. La Veta Avenue
Suite 710
Orange, California 92668

Counsel for Respondents